In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 105 86

PETER YOUNG, alias Young Lup,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals

for the Ninth Circuit

and

BRIEF IN SUPPORT THEREOF.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, upon Ap-

peal from the District Court of the United States at the City and County of Honolulu, for the Territory of Hawaii, on the 17th day of March, 1941, affirmed the judgment of conviction of the said trial court, involving an alleged criminal offense for the violation of the Harrison Anti-Narcotic Act, Section 6 of the Act of Congress of December 17, 1914, as amended, 38 Stat. 785, 40 Stat. 1130; 26 U. S. C. A., Sections 1041 and 1047; U. S. Internal Revenue Code, Sections 2551 and 2557. (R. 345.)

The indictment contained ten counts, two of which were dismissed upon motion of the prosecution. The jury brought in a verdict of guilty upon each of the remaining eight counts (R. 53) and the present petition for a Writ of Certiorari, is from the decision and judgment rendered in pursuance of said verdict. The opinion of the Circuit Court of Appeals states (R. 334-335):

> "The counts of the indictment are substantially the same, the only difference being that they charge dispensation of different amounts and kinds of drugs. Count III charges that the defendant, 'a physician who had duly registered and paid his special tax, as required by law, and who is entitled as a physician to sell, distribute, dispense and give away preparations and remedies which do not contain more than two grains of opium in one fluid ounce in the course of his professional practice, provided that he keeps a record of all sales, exchanges and gifts of such preparations and remedies for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that pur-

pose; that said defendant, from August 26, 1937, to July 21, 1939, at Honolulu, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, did sell, distribute, dispense and give away seventy-two (72) gallons and four (4) pints of a preparation and remedy which did not contain more than two grains of opium in one fluid ounce, to-wit: paregoric, and that said defendant did knowingly, willfully, unlawfully and feloniously fail to keep a record of the sales, exchanges and gifts of said amount of such paregoric which had been sold, distributed, dispensed and given away by said defendant during the period aforesaid so that such record was readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.' "

Twenty-nine alleged errors are assigned by the defendant, which fall into three general groups.

The first group relate to the sufficiency of the indictment and the evidence presented in support thereof.

The second group relate to the Court's charges to the jury.

The third group relate to the erroneous, unconstitutional interpretation of said Act, in particular, Section 6, and Regulations No. 5, United States Treasury Department, Bureau of Narcotics, Articles 179-185 inclusive; Section 151.2-151.185 of the Treasury Department Regulations issued under the Harrison Anti-Narcotic Act.

For a clear understanding of the position of the petitioner-defendant, we summarize or quote the applicable sections of the Act and its Regulations.

Sec. 2, of the Act in United States Treasury Department, Bureau of Narcotics, Regulations No. 5:

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 5 of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician,

dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: Provided, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act."

Sec. 6, of the Act in United States Treasury Department, Bureau of Narcotics, Regulations No. 5.

"That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semi-solid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: Provided, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of

evading the intentions and provisions of this Act: Provided, further, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 5 of this Act, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 1 of this Act and, if he is not paying a tax under this Act, he shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of internal revenue of the district in which he carries on such occupation as provided in this Act. The provisions of this Act as amended shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine."

United States Treasury Department, Bureau of Narcotics.

"Article 179. Stock preparations.—A practitioner who, in his office practice, administers minute quantities of narcotics in stock preparations,

may keep, as to such preparations, in lieu of the record required by Art. 177, a record of the date when each stock preparation is made or purchased and the date when the preparation is exhausted."

"Article 180. Extent of exemption.—The section of the law last quoted has the effect of conditionally exempting from liability under the other sections of the act persons manufacturing and dealing in certain narcotic preparations or remedies. Such persons are, however, subject to certain requirements laid down in section 6. Manufacturers of and dealers in exempt preparations are required to register as such whether liable to tax in that capacity or not. (See Art. 13 as to tax liability.)

Preparations containing cocaine or pantopon in any quantity, whether for internal or external use, are not within section 6 but are subject to all other provisions of the act."

"Article 181. Standards of exemption.—Preparations designed for or capable of internal use to be exempt shall not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce. The preparation shall contain active medicinal drugs other than narcotics in sufficient proportion to confer upon the preparation valuable medicinal qualities other than those possessed by the narcotic drug alone. Use for aural, nasal, ocular, rectal, urethral, or vaginal purposes is not regarded as external use and, therefore, preparations manu-

factured or used for such purposes containing more than the percentages of narcotic drugs as above indicated are not within the exemption.

There is no limitation upon the percentage of narcotic drugs external preparations may contain. In order to be within the exemption a preparation for external use, containing more than the maximum percentage of narcotic drugs above specified, shall contain ingredients rendering it unfit for internal administration."

"Article 182. Restrictions on dispositions.—A preparation conforming to the standards set out in Article 181 is exempt from stamp tax and the requirements pertaining to taxable narcotics only when manufactured, sold, distributed, given away, dispensed or possessed as a medicine. A manufacturer may produce and sell as exempt only preparations readily capable of use for claimed medicinal purposes, and sales thereof, if not to consumers, shall be made only to persons registered in Class V. Sales made to consumers, either by manufacturers or dealers shall be made only in such quantities and with such frequency to the same purchaser as will restrict their use to the medicinal purpose for which intended."

"Article 183. Dispositions to dealers.—Orders for exempt preparations except where sold to a registrant in Class VI are not required to be on any particular forms, but an order from a dealer shall not be honored by a manufacturer or other dealer unless it bears the registry number of the dealer giving the order. (See Articles 100, 105 and 111, relative to orders received from the Virgin Islands, Puerto Rico and the Philippine Islands, respectively.)

Where orders for exempt preparations are taken by a traveling salesman the salesman shall ascertain the registry number of the purchaser. The order shall not be filled by the manufacturer or vendor unless he knows the purchaser's registry number."

"Article 184. Dispositions to consumers.—Preparations or remedies which are within the exemption may be sold with or without prescriptions, and a prescription for such a preparation may be refilled provided, of course, the preparation is furnished in good faith for medicinal purposes only. The filling or refilling of narcotic prescriptions calling for more than one exempt preparation or a mixture consisting of an exempt preparation or remedy further reduced or diluted by the addition of non-narcotic medicinal agents is authorized, provided, of course, the preparation is furnished in good faith for medicinal purposes.

An extemporaneous prescription calling for narcotic drugs not in excess of the amounts specified in section 6 may be refilled in the same manner as a prescription calling for ready-made preparations or remedies, provided the mixture is sold in good faith for medicinal purposes only, and a record is kept of the sale in the manner indicated in Article 185."

"Article 185. Records required.—Every manufacturer, producer, compounder, or vendor (including dispensing physicians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions

to consumers. The record of dispositions to registrants shall show the name, address, and registry number of the registrant to whom disposed, the name and quantity of the preparation, and the date upon which delivery to the registrant, his agent or a carrier is made. The record of dispositions to consumers shall show the name of the recipient, his address, the name the quantity of the preparation, and the date of delivery.

Forms are not furnished for the keeping of these records, but the records shall be in the following form:

Form of record of dispositions to registrants

Date	Registration No. of recipient	Name of recipient	Address	Name of preparation	Quan

Form of record of dispositions to consumers

Date	Name of recipient	Address	Name of preparation	Quantity

In the case of manufacturers of or dealers in exempt preparations who are also registered as manufacturers of or dealers in taxable drugs in Class I or II, the foregoing requirement as to records of dispositions to registrants shall be deemed to be complied with, if all such disposi-

tions are evidenced by vouchers or invoices containing all the required information and such vouchers or invoices are kept in a separate file arranged chronologically.

As to records required in the case of registrants supplying exempt preparations to consumers pursuant to prescriptions issued by registered physicians, the foregoing requirement as to records of dispositions to consumers shall be deemed to be complied with if each such prescription shows the name and address of the recipient, the name and quantity of the preparation, and the date of filling, and the prescriptions are kept on the narcotic prescription file."

Peter Young, alias Young Lup, the defendant in the above entitled cause, and petitioner herein, a resident of the City and County of Honolulu, Territory of Hawaii, an American citizen by birth; a physician and surgeon, by profession, duly licensed to practice medicine in the Territory of Hawaii, and registered according to the provision of the Harrison Anti-Narcotic Act, who had paid the regular tax to the United States Internal Revenue Commissioner, as made and provided in such cases, admitted in form and substance that he purchased, dispensed and gave away the various drugs and quantities thereof alleged in all the counts of the Indictment, at the time, place and dates as alleged in the Indictment.

(1). That he dispensed said exempt preparations to his patients, in good faith as medicines for the treatment of various diseases, in the course of his professional practice only, and not with the purpose nor with

the intent to evade the provisions of the Act; that he did not keep a written record of said dispensations of said drugs, as required by Article 185 of Regulations No. 5 of the United States Treasury Department, Bureau of Narcotics, because said written record was not required by Section 2(a) of said Act, because the defendant dispensed said drugs, "in the course of his professional practice only" and "to patients upon whom said physician shall personally attend."

(2). That according to Article 179, printed on page 76 of Regulations No. 5 of the United States Treasury Department, Bureau of Narcotics, Record page 83, that it was not necessary for him a registered physician to keep a written record as required by Article 185 of said Regulations No. 5 and by Section 6 of the Act.

(3). That the mere failure to keep such a record, by a duly licensed physician that is duly registered is not a crime nor an offense against the United States, when such a physician dispenses exempt preparations in good faith as medicines to patients in the course of his professional practice only, upon whom such physician shall personally attend. (R. 247.)

The allegations of all the Counts of the Indictment and the evidence and stipulations introduced in support thereof, admit that defendant dispensed said drugs, within the purview of Section 6 of the Act and designated as non-taxable narcotics, or exempt preparations; further that he, the defendant, dispensed said exempt preparations in good faith, to patients as medicines, in the course of his professional practice only. (R. pp. 186, 187, 188.)

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

In this case, the United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of federal law, which has not been, but should be, settled by the Supreme Court of the United States.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled on its docket No. 9436, Peter Young alias Young Lup, appellant, v. United States of America, appellee, to the end that the cause may be reviewed and determined by this Court and that the judgment herein of said Court be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated at Honolulu, Hawaii, April 24, 1941.

FRED PATTERSON,
Counsel for Petitioner.

JOSEPH V. ESPOSITO,
HIRAM L. FONG,
Of Counsel.

In the Supreme Court

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit at the moment of writing this Brief has not been reported but is to be found on pages 334-344 of the record.

The case in the trial Court was unreported.

II.

JURISDICTION.

It is believed and urged that the jurisdiction of this Court is sustained by Judicial Code, section 240 as amended (28 U. S. C. A. sec. 347).

III.

STATEMENT OF THE CASE.

The petition contains a statement of the case.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in,

1. Holding and ruling that the indictment and the evidence presented in support thereof was sufficient to charge a crime.

2. Holding and ruling that the trial Court did not err in its charges to the jury.

3. Holding and ruling that the interpretation of said Act by the trial Court was valid and constitutional.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Question I.

Is the indictment and the evidence presented in support thereof, sufficient to charge a crime? or must the indictment negative by proper allegations, the statutory exception, privilege, or exemption granted to the defendant, a duly licensed and registered physician (a statutory permittee) as provided by Section 2 (a) and Section 6, of the Harrison Anti-Narcotic Act, to-wit: not "in the course of his professional practice only";—not "in good faith"; not "to a patient upon whom he shall personally attend", Section 2 (a); not "as medicine and with purpose of evading the intentions and provisions of this Act." Section 6.

Question II.

Did the Court err in its charges to the jury?

Question III.

Is the Court's interpretation of said Act, erroneous, and unconstitutional, in that it violates the 5th and 10th Amendments of the United States Constitution?

POINT I.

It is the contention of the appellant that the Harrison Anti-Narcotic Act grants and guarantees to the defendant, who is a licensed and registered physician

and surgeon (or a Statutory Permittee), the following rights and privileges:

(1). To prescribe, dispense and give away narcotics, which are taxable by the United States Treasury Department, Bureau of Narcotics, according to the provisions of the Act such as opium, morphine and cocaine, provided that said physician dispenses said taxable narcotics, to his patients as medicine in good faith, or "in the practice of his professional practice only," according to the fair standards of the medical profession, and if he keeps a proper written record, subject however to the exception made by provision of Section 2A, that the physician does not have to keep a written record of such taxable narcotics, if he dispenses said taxable narcotics to patients, in good faith, etc., "upon whom such physician shall personally attend."

(2). That said same physician has the right and privilege to prescribe and dispense non-taxable narcotics, such as paregoric, Linctus Compound Cough Syrup, Sedatol Cough Syrup, etc., as alleged in the respective counts of the Indictment, which said non-taxable narcotics are exempted from the taxable provisions of said Act because they contain minute doses of narcotics in combination with other drugs, and thereby become compounds used as medicines and household remedies and therefore considered as exempt preparation because they contain not more than one-fourth grain of morphine to the ounce; not more than one-eighth grain of Heroin to the ounce, etc., as provided by Section 6 of said Act; however, the Stat-

ute, (Section 6) has several provisions, as conditions precedent, before the non-taxable exemption and privilege attaches, to-wit: (1) that said physician shall prescribe said paregoric and other exempt preparations and remedies "as medicines", and "not for the purpose of evading the provisions of this Act"; (2) shall keep a written record as the Commissioner of Internal Revenue "shall direct", etc., to-wit: Article 185 of Regulations No. 5.

Therefore, it is our claim that if the said physician (or other statutory permittee) complies with all the provisions and conditions precedent as enumerated and provided by said Section 6 of the Act—then the said paregoric and other exempt preparations and remedies, become non-taxable and exempt.

If on the other hand the said physician (or other statutory permittee) fails to comply with any of the statutory provisions or conditions precedent, then said paregoric and other exempt preparations and remedies are not exempted and become taxable, just like the heroic or true narcotics such as morphine, opium and cocaine, and because of said violation of the conditions precedent, all the provisions of said Act would apply, in particular Section 2, and the provisions of Section 6 are nullified and become inapplicable.

However, there is no express or implied provision or declaration in the entire Harrison Anti-Narcotic Act, that makes the mere failure to keep a written record of exempt drugs that are non-taxable like paregoric, etc. (and as made and provided by Section 6), a crime or offense against the United States.

In other words Section 2 of the Act grants a physician the privilege to dispense taxable narcotics, if said dispensation is in good faith or in the course of his professional practice only; and the prohibition of said Section 2 is that a dispensation must not be in "bad faith" and/or "not in the course of his professional practice only".

That Section 6 of said Act grants a physician the same privilege to dispense non-taxable narcotics which are exempt preparations, if said dispensation is in "good faith", the prohibition of said Section 6 is that said dispensation of exempt drugs must not be "for the purpose of evading the interest of the Act."

So that, the essence of the crime prohibited by said Harrison Anti-Narcotic Act—is the dispensation of narcotics in "bad faith" by a physician or "not in the course of his professional practice only."

All the counts of the Indictment not only fail to allege the necessary allegations that the defendant did dispense said narcotics in bad faith, but on the contrary allege that the defendant dispensed said drugs "in the course of his professional practice" and by inference did dispense said drugs "in good faith". All the evidence of the trial admits that the defendant dispensed said drugs in good faith to patients as medicine.

On the other hand, the theory of the United States Government, as the Act has been construed by the Trial Court, and (as substantiated by the Indictment and the evidence) is: that the good faith or bad faith

of the defendant's dispensation of said drugs, is not the essence of the crime prohibited by Section 6, but that "bad faith" or "not in the course of his professional practice, is the essence of the crime, in regard to the heroic or true narcotics, prohibited by Section 2 of the said Act.

Authorities supporting appellant's contentions are:

(1). The mandates and specific provisions of the entire Act and in particular the first sentence of Section 6 of the said Act, to-wit:

> Section 6. "That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin or more than one grain of codeine, or any salt or derivative of any of them in a fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; . . ."

Section 2 provides as follows:

> "Nothing contained in this Section shall apply: (a). To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: Provided, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except

such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act."

Nigro v. U. S., 276 U. S. 332 at 341, 48 S. Ct. 388, 390, 72 L. Ed. 600.

"In interpreting the Act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress, and must be regarded as invalid, just as the Child Labor Act of Congress was held to be in Bailey Collection v. Drexel Furniture Company, 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817, 21 A. L. R. 1432."

Linder v. U. S., 268 U. S. 5, 69 L. Ed. 489, 45 Sup. Ct. 446.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

"Obviously, direct control of the medical practice is in the states, and is beyond the power of the Federal Government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure."

Authorities interpreting the Anti-Narcotic Act, in particular Section 2:

Linder v. U. S., 268 U. S. 5, 69 L. Ed. 489, 45 Sup. Ct. 446.

"The Indictment—it does not question the doctor's good faith nor the wisdom or propriety of his action according to medical standards. It does not allege that he dispensed the drugs otherwise than to a patient in the course of his professional practice, or for other than medical purposes. The facts disclosed indicate no conscious design to violate the law, no cause to suspect that the recipient intended to sell or otherwise dispose of the drugs, and no real probability that he would not consume them."

Jim Fuey Moy v. U. S., 254 U. S. 189, 194, 65 L. Ed. 214, 218, 4 Sup. Ct. Rep. 98.

"Manifestly, the phrases 'to a patient' and 'in the course of his professional practice only' are intended to confine the immunity of registered physician, in dispensing the narcotic drugs mentioned in the Act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer, or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug."

U. S. v. Anthony, 15 Fed. Supp. 553 (District Court of California).

"Physician who uses bad faith in prescribing narcotics is guilty of violation of Harrison Narcotic Act, but the fact that physician uses bad

judgment in prescribing does not render the physician guilty."

The appellant further maintains that the Court erred in refusing to grant the defendant's motions and request for a directed Verdict as set forth, in the Assignments of Error No. I, II and VIII (R. 124-133, 140) and for the following reasons:

That the Indictment is fatally defective, in all its counts, in that it does not charge the defendant with the commission of a crime against the United States, and fails to negative that the defendant failed to dispense the said drugs:

(1) in "good faith", or

(2) "in the course of his professional practice only" or

(3) "with the purpose of evading the intentions of the Act" or/and

(4) that the defendant failed to dispense said drugs "to patients upon whom he shall personally attend".

Authorities in support of the defective Indictment:

Linder v. U. S., 268 U. S. 5.

"In effect, the indictment alleges that the accused, a duly registered physician, violated the statute by giving to a known addict four tablets containing morphine and cocaine, with the exception that she would administer them to herself in divided doses, while unrestrained and beyond his presence or control, for the sole purpose of relieving conditions incident to addiction and keeping herself comfortable. It does not question the

doctor's 'good faith' nor the wisdom or propriety of his action according to medical standards. It does not allege that he dispensed the drugs otherwise than to a patient in the course of his professional practice, or for other than medical purposes. The facts disclosed indicate no conscious design to violate the law, no cause to suspect that the recipient intended to sell or otherwise dispose of the drugs, and no real probability that she would not consume them.

"The declared object of the Narcotic Law is to provide revenue, and this court has held that whatever additional moral end it may have in view must 'be reached only through a revenue measure and within the limits of a revenue measure'. United States v. Jim Fuey Moy, 241 U. S. 394, 402, 60 L. Ed. 1061, 1064, 36 Sup. Ct. Rep. 658, Ann. Cas. 1917 D, 854. Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced. M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. Ed. 579, 605; License Tax Cases, 5 Wall. 462, 18 L. Ed. 497; United States v. Dewitt, 9 Wall. 41, 19 L. Ed. 593; Keller v. United States, 213 U. S. 138, 53 L. Ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918 E, 724; Child Labor Tax Case,

259 U. S. 20, 66 L. Ed. 818, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449. In the light of these principles and not forgetting the familiar rule that 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score', the provisions of this statute must be interpreted and applied.

"The Narcotic Law is essentially a revenue measure, and its provisions must be reasonably applied with the primary view of enforcing the special tax. We find no facts alleged in the indictment sufficient to show that petitioner had done anything falling within definite inhibitions, or sufficient materially to imperil orderly collection of revenue from sales. Federal power is delegated, and its prescribed limits must not be transcended, even though the end seems desirable. The unfortunate condition of the recipient certainly created no reasonable probability that she would sell or otherwise dispose of the few tablets intrusted to her; and we cannot say that by so dispensing them the doctor necessarily transcended the limits of 'that professional conduct' with which Congress never intended to interfere."

U. S. v. Anthony, 15 Fed. Supp. 553.

"I am satisfied, therefore, that the Linder Case, and the cases which interpret it, lay down the rule definitely that the statute does not say what drugs a physician may prescribe to an addict. Nor does it say the quantity which a physician may or may not prescribe. Nor does it regulate the frequency of the prescriptions. Any attempt to so interpret the statute, by an administrative

interpretation, whether that administrative interpretation be oral, in writing, or by an officer or by a regulation of the department, would be not only contrary to the law, but would also make the law unconstitutional as being clearly a regulation of the practice of medicine."

Oliver v. U. S., 267 Fed. 545.

"Must allege that the sale of exempted products were not sold as medicines, in the practice of the profession but to defeat and evade intentions of the Act. Exception of Section 6—provided for humanitarian grounds."

Strader v. U. S., 72 Fed. (2d) 589.

"Physician is not precluded from giving addict moderate doses for purpose of curing disease or relieving suffering."

Boyd v. U. S., 271 U. S. 104.

"In determining whether or not the defendant, in prescribing morphine to his patients was honestly seeking to cure them of the morphine habit, while applying his curative remedies, it is not necessary for jury to believe that the defendant's treatment would cure the morphine habit, but it is sufficient if the defendant honestly believed his remedy was a cure for this disease."

"I instruct you that if this is true, regardless of whether the course of treatment given by this defendant is a cure, the question is, was he honestly and in good faith, in the practice of his profession, and in an effort to cure disease issued these prescriptions."

U. S. v. Freedman, 224 Fed. 276.

"An Indictment that alleges that narcotics were prescribed 'in quantities more than was necessary to meet the immediate needs of a patient, and did not distribute the drugs in good faith and as a medicine', held demurrable."

(Same case—250 U. S. 671.) Writ denied.

"Must allege 'not in the practice of profession only', 'not in personal attendance' ".

U. S. v. Hoyt, 255 F. 928;

U. S. v. Hoyt, 273 F. 792.

"An Indictment against the defendant must state that the drugs were dispensed not in the practice of profession only . . . "

Mitchell v. U. S., 2 Fed. (2d) 514.

"An Indictment for selling narcotics in violation of statute alleging that accused was duly registered physician, but not alleging that his disposition of narcotics was not in the course of his professional practice, is defective."

U. S. v. Hammers, 241 Fed. 542.

"An Indictment charging physician who had been duly requested by the collector of Internal Revenue and who had paid the tax required, with a violation of the Act in distributing narcotics, failed to negative the exception in favor of the physician's dispensing drugs to patients 'on whom they personally attend'."

"Held the Indictment insufficient and defective for the exception was part of the essential offense, the burden was upon the state to negative it . . ."

U. S. v. Hammers, 241 Fed. 542 at 544 (1917).

"It seems to me that it is necessary to show that a record was legally required to be kept before a defendant can be prosecuted for a failure to keep record, and unless this exception, which is contained in the very belly of the description of the offense, is negatived, no violation of the act is set fourth."

U. S. v. Leach (1923 Mich.), 291 Fed. 788.

"After careful consideration of the motion for a new trial and of the entire record, including the Indictment, I have concluded the indictment is so defective in its allegation that it fails to charge an offense cognizable in this court, the verdict must be set aside, and the indictment quashed."

At page 791:

"It is plain that the indictment simply charges failure of the defendant to do things which would exempt him from the statute without charging that he violated the statute."

"Indictment fails to negative the applicability of the exceptions contined in the statute.

"Verdict, Judgment, Sentence and all proceedings must be set aside and the indictment quashed.

"Although it would have been better practice for the defendant to avail himself of this objection by way of demurrer or motion to quash the indictment, yet as such an objection is not one based upon a mere matter of form, but involves an insufficiency of the indictment substantially affecting the rights of the defendant, the defect in

question is not be be regarded as waived by failure to demur, etc., it being settled that where an indictment omits an essential element of the offense attempted to be charged objection may be made even after verdict . . ."

Hardesty v. U. S., 168 Fed. 25;
Shitter v. U. S., 257 Fed. 724;
Cohn v. U. S., 258 Fed. 355;
Glatzmayer v. U. S., 84 Fed. (2d) 192.

"Indictment for dispensing drugs except on order form alleging that defendant was registered physician and issued prescription as such, was required to negative physician's privilege in order to state an offense.

". . . that prescription was not in the practice of the profession only.

". . . to sustain physician's privilege of dispensing drugs to patients in the course of physician's professional practice, there must be both patient and dispensing in the course of professional practice only, but absence of dispensing in the course of professional practice only will destroy privilege."

Ratigan v. U. S., 88 Fed. (2d) 919.

"Indictment alleging sales of morphine 'not made in the course of professional practice', nor 'in good faith', nor for legitimate medical purpose, and that buyer was free from disease, but sale made to gratify craving.

"Held sufficient to negative statutory exception permitting the physician to prescribe to patient in the course of professional practice only . . ."

For the same reasons and upon the same authorities, the appellant claims that the evidence introduced at the trial is insufficient to prove that the defendant is guilty of any crime or offense against the United States, and therefore the Verdict, Judgment and Sentence and all proceedings of the Trial Court should be set aside, and the Indictment quashed, and the defendant discharged as Not Guilty of any offense committed against the United States.

The Circuit Court of Appeals erred on page 6 of its opinion (R. 342-343), in holding and ruling—"All of the defendant's arguments as to the insufficiency of the evidence to sustain the conviction, and nearly all of the defendant's second group of alleged errors, are premised upon the assumption that a registered physician had a right and privilege to dispense any and all narcotics, as medicines, in good faith, to a patient, upon whom such physician shall personally attend, without the necessity of keeping a record thereof. Our ruling above that there is no such privilege as to exempt preparations disposes of these assignments of error."

The above ruling of the court, in its interpretation of the Act, in especial Section 2A, and Section 6, creates the paradox; to-wit: that, if a physician dispensed morphine, opium, heroin or cocaine, the true or heroic and taxable narcotics, he has the right and privilege to dispense them, as medicines, in good faith to a patient upon whom such physician shall personally attend, without the necessity of keeping a record thereof, on the other hand, if the same said registered

physician dispensed paregoric, or Linctus Cough Syrup, or cold tablets, ordinary household remedies, and/or advertised proprietary patent drugs, containing minute doses of narcotics as provided by Section 6 of the Act, which are non-taxa' drugs or exempt preparations, then the same said gistered physician, who has paid his revenue tax, has no right, and no privilege to dispense said non-taxable, exempt preparations, as medicines, in good faith, to a patient upon whom such physician shall personally attend without the necessity of keeping a record thereof, and therefore is a criminal.

POINT II.

ASSIGNMENT OF ERROR No. III.

The Court erred in instructing the jury as requested by the United States, in the United States Requested Instruction No. 3A:

The Court. Gentlemen of the Jury, you are instructed that ignorance of the law is no excuse.

To the giving of the instruction above set out, the defendant objected, and stated his reasons therefor orally in the Judge's Chambers in the presence of the United States District Attorney, after argument was had upon the same, to wit: No evidence to support the aforesaid instruction of ignorance of the law; that it is irrelevant, immaterial and incompetent, and prejudicial to the rights and defense of the defendant, in that it rebutted the presumption of innocence and his defense as disclosed by the evidence; later the defend-

ant, at the conclusion of the charge of the Court, in the presence of the jury, before the jury retired, duly excepted:

Mr. Esposito. The defendant takes exception to the Court giving over objection of the defendant the Government's Requested Instruction No. 3A.

The Court. Exception allowed (R. 314).

We respectfully submit, that the giving of the aforesaid instruction is reversible error, for it is not based upon any of the evidence adduced at the trial, in fact, all the evidence is directly contrary to said instruction.

Evidence of the United States witness, Barthelmess (R. 188-234) and Evidence of the defense, Peter Young, alias Young Lup (R. 250), all of which evidence incontrovertibly proves that the defendant was not "ignorant of the law" on the contrary—the defense was that the defendant was well acquainted with the law, and that because of his personal attendance upon patients in the course of his professional practice only, it was not necessary for him, a registered physician, to keep a written record of said dispensation; secondly, that because the drugs dispensed were "stock preparations" of said exempt drugs as alleged in the counts of the Indictment, that according to Rule 179 of U. S. Treasury Department, Bureau of Narcotics, Regulations No. 5:

> "Stock preparations.—A practitioner who, in his office practice, administers minute quantities of narcotics in stock preparations, may keep, as to such preparations, in lieu of the record re-

quired by Article 177, a record of the date when each stock preparation is made or purchased and the date when the preparation is exhausted,"—

he did keep a written record as provided by said Article 179, and the defendant introduced the Defendant's Exhibits "A" to "K", to substantiate his claim of aforesaid defense (R. 259-265).

Chesapeake & O. Ry. Co. v. Cochran (C.C.A. W. Va. 1927), 22 F. (2d) 22.

"It is reversible error to give an instruction not based on the evidence."

(2) The giving of said instruction is also reversible error, in that it was highly prejudicial to the substantial rights of the defendant as guaranteed to him by the Constitution, in that it was violation of the "due process" clause of the Fifth Amendment and deprived the defendant of his presumption of innocence; it further prejudiced the jury against the defendant, in that it misled the jury into the mistaken belief of fact and law, to-wit: that the defendant claimed as his defense—"mistake of law", which was not claimed by the defendant.

It is reversible error, where the instruction given took from the jury, the principal issue of fact.

St. Clair v. U. S. (1927), 23 F. (2d) 76.

ASSIGNMENT OF ERROR No. VII.

The Court erred in instructing the jury as requested by the United States, in the United States Requested Instruction No. 7:

The Court. The Court instructs the jury that evidence is of two kinds—direct and circumstantial. Direct evidence is when a witness testified directly of his own knowledge of the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances in a certain case, from which the jury may infer other and connected facts, which usually and reasonably follow, according to the common experience of mankind. Crime may be proven by circumstantial evidence as well as by direct testimony of eye-witnesses; but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence.

To the giving of the instruction above set out, the defendant objected, and stated his reasons therefor orally in the Judge's Chambers in the presence of the United States District Attorney, after argument was had upon the same, to-wit: irrelevant and immaterial, misleading to the jury and prejudicial to the defendant; later the defendant, at the conclusion of the charge of the Court, in the presence of the jury, before the jury retired, duly excepted:

Mr. Esposito. The defendant takes exception to the Court giving over objection of the defendant the Government's Requested Instruction No. 7.

The Court. Exception allowed (R. 314).

The aforesaid Assignment needs little comment. There was no necessity to expound the law of circumstantial evidence upon the facts of this case, and therefore said instruction is irrelevant, immaterial, incompetent, misleading to the jury, and prejudicial to the defendant.

ASSIGNMENT OF ERROR No. VIII.

The Court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to-wit, "That there is no substantial evidence to prove defendant guilty of any crime or offense", were assigned by the defendant, through his counsel, to the Court in Chambers in the presence of the United States Attorney, the Defendant's Requested Instruction No. 1 as follows:

Defendant's Requested Instruction No. 1.

"Gentlemen of the Jury, I instruct you to find the defendant not guilty as charged on all the counts of the Indictment."

Upon the Court refusing to give the Defendant's Requested Instruction No. 1 above set out, the defendant, by his counsel, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly excepted:

Mr. Esposito. The defendant also takes exception to the Court's decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 1.

The Court. Exception allowed (R. 314).

Assignment of Error No. VIII is discussed in the Argument of Assignments of Error Nos. I and II and needs no further comment.

ASSIGNMENT OF ERROR No. XXIV.

The Court erred in refusing to give at the request of the defendant, after extended argument was had and the following reasons, to-wit, "That said instruction is the law upon the evidence not covered in the charge of the Court; its refusal by the Court misleading to the jury and is prejudicial to the rights of the defendant", were assigned by the defendant through his counsel, to the Court in Chambers, in the presence of the United States Attorney, the Defendant's Requested Instruction No. 23, as follows:

> Defendant's Requested Instruction No. 23.
>
> "The court instructs the jury that in a criminal case, the burden of proof never shifts to the defendant, and in this case the burden of proof remains upon the United States throughout the case to prove the guilt of the defendant, and the burden does not, under any circumstances, shift to the defendant to prove his innocence."
>
> Branson, Sec. 379, pp. 399-400.

Upon the Court refusing to give the Defendant's Requested Instruction No. 23 above set out, the defendant, by his counsel, at the conclusion of the charge of the Court, in the presence of the jury and before the jury retired, duly excepted.

Mr. Esposito. The defendant also takes exception to the Court decision in refusing to give to the jury, in its charge and instructions, the Defendant's Requested Instruction No. 23.

The Court. Exception allowed (R. 314).

The aforesaid is a stock instruction passed by many Courts as the law of the land and needs no discussion. According to the authority of *Davis v. U. S.*, 160 U. S. 469, it seems to your appellant, that the Court's refusal to give the said instruction on the burden of proof is reversible error, in that it is a deprivation of the defendant's constitutional right, and that the defendant did not receive a fair and impartial trial.

Terr. v. Wong Pui, 29 Haw. 441-452.

Davis v. United States, 160 U. S. 469 at 487.

"Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime."

Guiteaus Case, 10 Fed. Rep. 161-163 accord.

State v. Bartlett, 43 W. H. 224, 80 Am. Dec. 154.

"A system of rules, therefore, by which the burden is shifted upon the accused of showing any of the substantial allegations in the Indictment to be untrue, or in other words, to prove a negative is purely artificial and formal, and

utterly at war with the humane principle which in favorem vitae, requires the guilt of the prisoner to be established beyond reasonable doubt."

POINT III.

ASSUMING FOR THE SAKE OF ARGUMENT.

(1) that Section 6 of the Anti-Narcotic Act, or that the interpretation of said Section 6, or that Articles 180-185 of the United States Treasury Department, Bureau of Narcotics, Regulations No. 5, or any of said assumption should declare—that the mere failure to keep proper records of exempt drugs dispensed by a physician as alleged in all the counts of the Indictment, to constitute a crime or offense against the United States—then it is the contention of this appellant that to that extent; namely, to said part of Section 6, or to such interpretation of Section 6, or to those Articles 180-185 of said United States Treasury Regulations or any part of them, constituting said crime or offense, it is rendered invalid, in that it is unconstitutional and for the following reasons:

First, it violates the "due process" clause of the Fifth Amendment of the United States Constitution, in that, said Statute either forbids or requires the doing of an act in terms so vague, ambiguous and uncertain, that men of common intelligence must necessarily guess its meaning and differ as to its application.

U. S. v. Ballard, 12 Fed. Supp. 321.

"Statute which either forbids or requires, the doing of an act in terms so vague, that men of

common intelligence must necessarily guess its meaning and differ as to its application, violates the 'due process of law' ".

U. S. v. Reese, 92 U. S. 214.

"If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

Harrop v. U. S., 10 Fed. Supp. 753.

"Administration officer acting under statutory power to make regulations may not adopt any regulation which abridges and enlarges the terms of the statute."

Miller v. Standard Nut Margarine Co., 284 U. S. 498.

"Tax laws are to be interpreted liberally in favor of taxpayers; words defining things to be taxed may not be extended beyond their clear import, doubts must be resolved against Government and in favor of taxpayer.

"The Commissioner's action was not only based upon an erroneous construction of the statute, but was arbitrary and capricious, and not uniformly applied—and discriminatory."

Secondly, that Section 6 or its interpretation, or Articles 180-185 of Regulations No. 5—further violates "the due process" clause of the Fifth Amendment, in that, it, or its said interpretation, is inconsistent with Section 2 of the same Act, and therefore

and thereby deprives the defendant-appellant of his statutory permittee rights, as guaranteed to him, by said Section 2, to-wit: that any registered physician (or a statutory permittee) is privileged to dispense narcotics, as medicines, to his patients, in good faith, and in the practice of his profession only, and therefore and as a result thereof said Statutory permittee or physician is not under the duty to keep records of said dispensations of said medicines, when said drugs are "distributed to a patient upon whom such physician shall personally attend".

Campbell v. Galeno Chemical Co., 281 U. S. 599.

"The limits of the power to issue regulations, that power or its exercise by rule or regulation cannot extend the statute, or modify its provision.

"It thus attempts to deprive permittee of rights secured to them by these sections of the Act."

Thirdly, that said Section 6 of the Anti-Narcotic Act, or the interpretation of said Section 6, or the Articles 180-185 of the United States Treasury Department, Bureau of Narcotics, Regulations No. 5 (United States Exhibit 1, R. 80), or either or any of them, are invalid in that, it is a further violation of the Tenth Amendment of the United States Constitution and for the following reasons:

(a) that it is an attempt of the Federal Government to regulate the practice of medicine.

(b) that it is an attempt of the Federal Government to regulate local sales and dispensation of drugs.

(c) that it is an attempt of Congress to delegate powers to the Commissioner of the Internal Revenue of the United States Treasury Department, Bureau of Narcotics, which powers are not delegated to Congress by the United States Constitution.

Authorities supporting the third contention.

(a) *Linder v. U. S.*, 268 U. S. 5 (supra);

(b) *Nigro v. U. S.*, 276 U. S. 332 at 341 (supra);

(c) *Hurwitz v. U. S.*, 280 Fed. 109:

"The power of the Commissioner of the Internal Revenue with the approval of Secretary of Treasury—to make all needful rules and regulations for carrying the provisions of the Narcotic Act—into effect, did not confer the power to say that a physician could not personally attend a patient at his office.

"The enforcement of the Act did not require any such rule, and it is contrary to the language of the act itself which is plain and unambiguous, and says nothing about where the patient shall be when personally attended. If Congress had intended to exclude personal attendance at the office, it would have said so—the fact of omission is strong evidence that it did not intend to say so—Congress cannot delegate legislative power to an executive officer."

U. S. v. Eaton, 144 U. S. 677.

"A regulation made August 25, 1886, by the Commissioner of Internal Revenue with approval of Secretary of Treasury under Section 20 of the

Act of August, 1886, 24 Stat. 209, in relation to oleo margarine, required wholsale dealers therein to keep a book, and make a monthly return, showing certain prescribed matters.

"A wholesale dealer in the article who fails to comply with such regulation is not liable to the penalty imposed by Section 18, of the Act, because he does not omit or fail to do a thing required by law, in the carrying on or conducting of his business.

"There are no common law offenses against the United States. It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and the statutory authority in the present case was not sufficient."

At page 688.

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue as a needful regulation under the oleo margarine act, for carrying it into effect, could be considered as a thing 'required by law', in the carrying on or conducting of the business of a wholesale dealer in oleo margarine, in such a manner as to become a criminal offense, punishable under Section 18 of the Act particularly when the Act, in Section 5 requires a manufacturer of the article to keep such books and render such returns as Commissioner of Internal Revenue with the approval of Secretary of Treasury, may, by regulation, require, and does not impose, in that Section, or elsewhere, in fact, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

"It is necessary that a sufficient statutory authority should exist for declaring any act or omission, a criminal offense."

Anero v. Phillips Petroleum Co., 25 Fed. Supp. 458.

"A statute creating a new crime or evidencing new regulative excursion into field of business by government, must be so plain as to notify ordinary citizen of such move."

Campbell v. Galeno Chemical Works, 281 U. S. 599, 74 L. Ed. 1063.

"The limits of the power to issue regulations, that power or its exercise by rule or regulation cannot extend the statute, or modify its provision.

"It thus attempts to deprive permittees of rights secured to them by these Sections of the Act."

Miller v. Standard Nut Margarine Co., 284 U. S. 498.

"Tax laws are to be interpreted liberally in favor of taxpayers; words defining things to be taxed may not be extended beyond their clear import, doubts must be resolved against Government and in favor of taxpayer.

"The Commissioner's action was not only based upon an erroneous construction of the statute, but was arbitrary and capricious, and not uniformly applied—and discriminatory."

Sawyer v. U. S., 10 Fed. (2d) 416.

"Authority to make rules and regulations necessary for carrying out the purposes of a

legislative act can confer no authority to change the act itself, and thereby deprive one of a right given by the act."

Field v. Clark, 143 U. S. 649, 36 L. Ed. 294;
Morrill v. Jones, 106 U. S. 466;
U. S. v. Eaton, 144 U. S. 677, 36 L. Ed. 591;
Lynch v. Tilden, 265 U. S. 315.

Lynch v. Tilden, 265 U. S. 315.

"32 Stat. 193:—defines adulterated butter in fact, as 'any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream.

(a) The mere fact that butter contains 16% or more of moisture does not bring it within the statutory definition.

(b) A regulation made by the Commissioner of Internal Revenue approved by Secretary of Treasury declaring that any butter having 16% or more of moisture is adulterated, conflicts with the above statutory definition and is void.

Statute authorizing to prescribe rules and regulations does not sustain a regulation which eliminates conditions. Words and phrases contained in the statutory definition and substitute others."

The Circuit Court of Appeals on pages 5-6 of its opinion says (R. 341): "furthermore Section 2555 contains an affirmative requirement that all persons liable to any tax imposed by the Act shall keep records prescribed by the Secretary. If, as defendant argues, failure to keep records prescribed in Section 2551 merely subjects him to taxation and the main provisions of the

Act, then he is subject to Section 2555." Granting the reasoning of the Court, the defendant replies to said assertion that if "he is subject to Section 2555", he is also subject to the entire Harrison Anti-Narcotic Act and in especial Section 2A, or Section 2554 of the same Act, which grants to him (a statutory permittee) a licensed physician who has paid his narcotic tax, a right, privilege and immunity that he, such a person is excepted from keeping written records if he dispenses said narcotics "to a patient, upon whom such physician shall personally attend."

The court misconstrued the argument of the defendant, to-wit: that if according to Section 6 of the Act or Section 2551, the defendant dispensed the exempt preparations as medicines, in good faith, and with proper records, the said drugs being conditionally exempted from taxation would become absolutely exempted from taxation; and not subject to the remaining provisions of the Act, that on the other hand the moment the defendant violated any of the statutory provisions, both the defendant and the exempt preparations, would be subjected and liable to the remaining provisions of the Act, namely the said exempt preparations would lose the exemption and become taxable narcotics as provided in Section 1 and the defendant would become liable to Section 2, in particular Section 2A, providing the exception to the defendant, to-wit: that if the physician prescribes narcotic, in the course of his professional practice only to patients upon whom he shall personally attend then a written record of that dispensation is not necessary.

Furthermore, it is begging the question, if not evading it, for the court to say that the said wording of Section 6 makes one provision a "condition precedent" and the other provision an "affirmative requirement" and to infer that there is no crime committed if you violate the provision designated by the Court as "condition precedent" on page 5 of its opinion as follows: "'Provided that such remedies and preparations are manufactured, sold as medicines and not for the purpose of evading the intentions and provisions' of the Act." This is clearly by its very wording a condition precedent. In order to be exempt even though they contain a limited amount of narcotics, they must be sold, etc. as medicines only. Then comes the provision relied on by the defendant, couched in entirely different language—"'shall keep a record of all sales'. We hold that this is an affirmative requirement that all vendors of 'exempt preparations' including dispensing physicians, must keep the record referred to."

Again granting the reasoning of the court, that the aforesaid two provisions "are couched in different language" and that "shall keep a record of all sales" is an affirmative requirement; and yet the defendant says "affirmative requirement" is still a "condition precedent", and that said "affirmative requirement" "Shall keep a record of all sales" does not make the said violation of the "affirmative requirement" a Federal crime, according to the remaining provisions of the Act.

The truth of the matter, as decided by the case of *Linder v. U. S.*, 268 U. S. 5, 69 L. Ed. 489, 45 Sup. Ct.

446, and the case of *Nigro v. U. S.*, 276 U. S. 332 at 341, 48 S. Ct. 388, 390, 72 L. Ed. 600, is that the evidence of the crime prohibited by the Act, is the "bad faith" in the dispensation of said narcotics as provided by the words in Section 2—"in the course of his professional practice only", as provided by Section 6, "as medicine, and not for the purpose of evading the intentions and provisions of the Act," and yet, the court suggests that the essence of the crime is a condition precedent and not an "affirmative requirement" contrary to all precedents construing said Act.

Linder v. U. S., 268 U. S. 5, 69 L. Ed. 489, 45 Sup. Ct. 446;

Nigro v. U. S., 276 U. S. 332 at 341, 48 S. Ct. 388, 390, 72 L. Ed. 600;

Jim Fuey Moy v. U. S., 254 U. S. 189, 194, 65 L. Ed. 214, 218, 4 Sup. Ct. Rep. 98.

It is respectfully submitted that a perusal of the aforesaid, will disclose that the aforesaid questions of law, involved in this Appeal are of great public moment and concern to every practicing physician and surgeon, nurse and hospital that dispense the aforesaid various household remedies containing minute amounts of narcotics dispensed for the treatment of the common ills that afflict humanity, without the nuisance of keeping records of said exempt preparations; and to interpret the aforesaid statutory provision declaring that the mere failure to keep said records, a matter of bookkeeping and accounting, to be a crime against the United States of America is not only legislation regulating the practice of medicine, but invalid and unconstitutional for the reasons herein set forth.

CONCLUSION.

For the reasons set out above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and thereafter reviewing and reversing the adverse decisions.

Dated at Honolulu, Hawaii, April 24, 1941.

FRED PATTERSON,
Counsel for Petitioner.

JOSEPH V. ESPOSITO,
HIRAM L. FONG,
Of Counsel.